am delighted that he has played an important role in this piece of legislation, as he has in so many others. And it will be, I am sure, successfully pursued.

The PRESIDING OFFICER. Under the previous order, the conference report is agreed to, and the motion to reconsider the vote is laid upon the table.

The conference report was agreed to.

EXECUTIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session to consider the nomination of William A. Fletcher to be a United States Circuit Judge.

NOMINATION OF WILLIAM A. FLETCHER, OF CALIFORNIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT

The PRESIDING OFFICER. The clerk will report Executive Calendar No. 619, on which there will be 90 minutes of debate equally divided in the usual form.

The assistant legislative clerk read the nomination of William A. Fletcher, of California, to be United States Circuit Judge for the Ninth Circuit.

Mr. SESSIONS addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, the role of the Senate is to advise and consent in nominations by the President for judicial vacancies. That is understood in the Constitution. Every nominee of the President comes before the Judiciary Committee and then they come before this body for a vote. We are at this point analyzing the nomination of William Fletcher, Willie Fletcher from California, to the Ninth Circuit. I regretfully must say I have concluded that I have to oppose that nomination. And I would like to discuss the reasons why.

Most of the nominations that have come forward from the President have received favorable review by the Judiciary Committee. In fact, we cleared nine today. A number of them are on the docket today and will probably pass out today. So we are making some substantial progress.

Nearly half of the vacancies that exist now in Federal courts are because there are no nominees for those vacancies—almost half of them. But on occasion we need to stand up as a Senate and affirm certain facts about our courts and our Nation. One of the facts that we need to affirm is that courts must carry out the rule of law, that they are not there to make law. The courts are there to enforce law as written by the Congress and as written by the people through their Constitution that we adopted over 200 years ago. Also, that is, I think, where we are basically today.

With regard to this nomination, it is to the Ninth Circuit Court of Appeals in California. Without any doubt, the Ninth Circuit is considered the most liberal circuit in the United States. It is also the largest circuit. There are 11 circuit courts of appeals. And in the United States we have the U.S. district judges. These are the trial judges. The next level—the only intermediate level—is the courts of appeals. And they are one step below the U.S. Supreme Court. It is the courts of appeals that superintend, day after day, the activities of the district judges who practice under them.

There are more district judges in the circuit than there are circuit judges. And every appeal from a district judge's ruling, almost virtually every one, would go to the courts of appeals in California and Arizona and the States in the West that are part of the Ninth Circuit. Those appeals go to the Ninth Circuit, not directly to the U.S. Supreme Court. As they rule on those matters, they set certain policy within the circuit.

We have—I think Senator BIDEN made a speech on it once—we have 1 Constitution in this country, not 11. The circuit courts of appeals are required to show fidelity to the Supreme Court and to the Constitution. The Supreme Court is the ultimate definer of the Constitution. And the courts of appeals must take the rulings of the Supreme Court and interpret them and apply them directly to their judges who work under them or in their circuit and in fact set the standards of the law.

We do not have 11 different circuits setting 11 different policies—at least we should not. But it is a known fact that the Ninth Circuit for many years has been out of step. Last year, 28 cases from the Ninth Circuit made it to the U.S. Supreme Court. The Supreme Court does not hear every case. This is why the circuits are so important.

Probably 95 percent of the cases decided by the circuits never are appealed to the Supreme Court. The Supreme Court will not hear them. But they agreed to hear 28 cases from the Ninth Circuit. And of those 28 cases, they reversed 27 of them. They reversed an unprecedented number. They reversed the Ninth Circuit 27 out of the 28 times they reviewed a case from that circuit. And this is not a matter of recent phenomena.

I was a Federal prosecutor for almost 15 years, and during that time I was involved in many criminal cases. And you study the law, and you seek out cases where you can find them. Well, it was quite obvious—and Federal prosecutors all over the country used to joke about the fact that the criminal defense lawyers, whenever they could not find any law from anywhere else, they could always find a Ninth Circuit case that was favorable to the defendant. And they were constantly, even in those days, being reversed by the U.S. Supreme Court, because the U.S. Supreme Court's idea and demand is that we have one Constitution, that the law be applied uniformly.

So I just say this. The New York Times, not too many months ago, wrote an article about the Ninth Circuit and said these words: ''A majority of the U.S. Supreme Court considers the Ninth Circuit a rogue circuit, out of control. It needs to be brought back into control. They have been working on it for years but have not been able to do so.''

All of that is sort of the background that we are dealing with today.

When we get a nominee to this circuit, I believe this Senate ought to utilize its advise and consent authority, constitutional duty, to ensure that the nominees to it bring that circuit from being a rogue circuit back into the mainstream of American law, so we do not have litigants time and again having adverse rulings, that they have to go to the Supreme Court—however many thousands and hundreds of thousands of dollars—to get reversed.

This is serious business. Some say, ''They just reversed them. Big deal.'' It costs somebody a lot of money, and a lot of cases that were wrong in that circuit were never accepted by the Supreme Court and were never reversed. The Supreme Court can't hear every case that comes out of every circuit. So we are dealing with a very serious matter.

The Senator from Ohio who I suspect will comment today on the nominee, Senator DeWine, articulated it well. When we evaluate nominees, we have to ask ourselves what will be the impact of that nomination on the court and the overall situation. We want to support the President. We support the President time and again. I have seen some Presidential nominees that are good nominees. I am proud to support them. There are two here today who I know personally that I think would be good Federal judges. But I can't say that about this one.

We need to send the President of the United States a message, that those Members of this body who participate in helping select nominees cannot, in good conscience, continue to accept nominations to this circuit who are not going to make it better and bring it back into the mainstream of American law.

With regard to Mr. Fletcher, he has never practiced law. The only real experience he has had outside of being a professor, was as a law clerk. His clerkship was for Justice William Brennan of the U.S. Supreme Court. That is significant and it is an honor to be selected to be a law clerk for the Supreme Court. But the truth is, Justice Brennan has always been recognized as the point man, the leading spokesman in American juris prudence for an activist judiciary. I am not saying he is a bad man, but that is his position.

Justice Brennan used to dissent on every death penalty case, saying he adhered to the view that the death penalty was cruel and unusual punishment, and within that very Constitution he said he was interpreting, there are at least four to six references to the death penalty and capital crimes.

The Founding Fathers who wrote that Constitution never dreamed that anyone would say that a prohibition of cruel and unusual punishment would prohibit the death penalty, because the death penalty was in every State and colony in the United States at the time the Constitution was adopted. It never crossed their minds.

This is an example of judicial activism when Justice Brennan would conclude that he could reinterpret the Constitution and what the people contracted with their Government when they ratified it. It says, ''We, the people, ordain and establish this Constitution. . ..'' So they adopt it; it is reinterpreted. That is a classic definition of judicial activism.

We know Mr. Fletcher was his law clerk and has written a law review article referring to Justice Brennan as a national treasure. It is obvious he considers him an outstanding judge and a man he would tend to emulate.

Of course, judicial activism is part of his family. One of the problems, and the Presiding Officer has attempted to deal with it through legislation, and was successful. Just today, I believe, we have passed legislation dealing with nepotism, two family members serving on the same court.

The truth is, Mr. Fletcher's mother is a judge on the Ninth Circuit already. Of the judges in the United States, I am sure she would be viewed as one of the most activist—in the Ninth Circuit, it is common knowledge she is one of the most activist nominee members of that court. It doesn't mean he will be, but he is connected to Justice Brennan, and his mother is a very liberal, an activist, and will remain on the court as a senior judge and will have the opportunity to participate in a substantial number of the opinions that are rendered by the Ninth Circuit, because they have three-judge panels who assign these cases out of the judges there and they often put these judges on a panel. If she takes senior status, which I understand she has agreed to do, she would not resign from the bench but take senior status and still be able to handle a substantial caseload. That is a troubling fact to me.

To me, a judge is a very important position at any level of the courts. This is not an absolute disqualifying factor to me, but it is a very important factor to me, and that is that Mr. Fletcher lacks any private practice experience. Mr. Fletcher has never practiced law. Mr. Fletcher has never tried a lawsuit. He has been a law clerk for William Brennan and a professor at the University of California Law School. He has never been in the courtroom as a litigant. He has never had the opportunity to have that knot in your stomach when a judge is about to rule on a motion, to understand the difficulties in dealing with human nature. He has not had that experience.

Having had 15 years of full-time litigation experience in Federal court trying cases, you learn things intuitively. Supreme Court justices and appellate court justices will be better judges if they have had that experience. It is an odd thing, and not a healthy thing, normally; it takes extraordinary and exceptional circumstances, in my opinion, to conclude that someone who has been nothing but a law professor all their life is now qualified to take a lifetime appointment to review the decisions of perhaps 100 or more trial judges in their district who are working long and hard, for whom he has never had the opportunity to practice before and see what it is like. That is not a good thing in itself. That is another reason I have serious reservations about this nominee.

Certainly Mr. Fletcher has a right to speak out, but in 1994, not too many years ago, he made a speech in which he criticized the ''three strikes'' law legislation, the criminal law changes that have swept the country, calling it ''perfectly dreadful legislation.'' He has never been a prosecutor. He has never been a judge. He has never been a lawyer. Here he is saying this about this legislation, which I believe is widely supported throughout the country. In my opinion, it has helped reduce the rise in crime, because ''three strikes and you are out'' focuses on repeat, habitual offenders.

Make no mistake, somebody will say, ''You will have everybody in jail, Jeff.'' Not so; everybody is not a repeat, three-time felony offender. If you focus on the repeat offender, those are the ones committing a disproportionate percentage of crime. We have done a better job on that in the last 10 or 15 years. We have tough Federal laws dealing with repeat offenders. States have implemented ''three strike'' laws and it has helped draw down the rise in crime. As a matter of fact, crime has been dropping after going up for many years because we got tough and identified the repeat offenders and prosecuted them successfully and States have stepped up to the plate and done so.

He criticized that. That gives me a real insight into his view about criminal law, and here he will be presiding over reviewing cases of trials involving murderers and other criminals in the Ninth Circuit and he has never had any experience.

The only thing we know about him is that he considers good, tough law legislation dreadful.

(Mr. ASHCROFT assumed the Chair.)

Mr. SESSIONS. Mr. President, I want to share some thoughts with you about judicial activism. In 1982, Mr. Fletcher wrote an article entitled ''The Discretionary Constitution.'' He was a professor then. It has been interpreted by many as a blatant approval of judicial activism. He discusses institutional suits. I was attorney general of the State of Alabama and I had to deal with Federal judges who have major court orders dominating the prison system. Most States have prison systems under court order, having Federal judges ruling those, and mental health systems and school funding issues are decided by Federal judges. So he wrote about that and other issues. In that article, this is what he said, and it really troubles me:

> The only legitimate basis for a Federal judge to take over the political function in devising or choosing a remedy in an institutional suit is a demonstrated unwillingness or incapacity of the political body.

I want you to think about that. That is a revealing quote, that, well, the only way you can do it is if the institution demonstrates an unwillingness or incapacity to act. That is the rationale of the liberal activist. What they say is, well, the State of Alabama didn't provide enough gruel for the criminals, so we are going to issue an order and tell them what they have to feed them three times a day. Or we are going to have a law library for every prison, and they have to have so many square feet. Or you have to spend so much money on education; you have to change your whole way of funding education in your State. Why? Because the State would not act.

Now, we live in a democracy. In a democracy, the people rule; they decide what they want to do. I know the distinguished Senator in the Chair, Mr. ASHCROFT, shares this view. I have heard him express it. I think these are his exact words: ''When the legislature does not act, that is a decision.'' When they go into session, they decide to act on matters or not act on them, and not acting is an action, a decision not to act. The people have influence with that because they elect their representatives and, if they are not happy, they can remove them from office.

But you can't remove a Federal judge because he has a lifetime appointment. He cannot be removed, except for the most serious personal abuses of office. Normally, making bad decisions is not one of those. I will just say this. We have a circuit that is in trouble. It is considered by a majority of the Supreme Court to be a rogue circuit. We need to put nominees on this circuit and move it back into the mainstream and not continue it out on the left wing. We have a responsibility to assure that the judges we confirm are going to improve the courts, and I think we need to vote ''no'' on this nomination because I don't believe it will take us back in the direction we need to go. I think it will take us in the wrong direction.

Mr. President, I yield the floor.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah is recognized.

Mr. HATCH. Mr. President, I yield myself such time as I need.

Mr. President, I rise to speak on the nomination of Professor William Fletcher, nominee to the Ninth Circuit Court of Appeals. I am pleased that the U.S. Senate is finally fully considering this nominee.

Mr. Fletcher was first nominated during the 104th Congress on December

21, 1995. I do regret the fact that his nomination has languished for as long as it has, but I would like to comment on some of the obstacles that have hindered this nomination.

First, all nominees to the Ninth Circuit Court of Appeals got bound up within the difficulties we were having with deciding whether or not to divide the Ninth Circuit. Once we established a commission to look into this matter, we have been able to process nominees to that court.

Second, some had concerns—legitimate concerns—that Professor Fletcher's mother, Betty Fletcher, currently serves as a judge on the Ninth Circuit. There is a statute that appears to prevent two people, closely related by blood or marriage, from serving on the same court. Now, the Justice Department said that only applies to people less than the judiciary, but that was pure bunk as far as I was concerned. The statute is pretty clear. Yes, it is an old statute, but it is clear and it is a matter of great concern to me. To ensure compliance with that law—or to the best of my ability to make sure that this law is complied with, Judge Betty Fletcher has agreed to take senior status upon her son's confirmation, and Senator KYL has introduced legislation, which passed the Senate last night, which I support, that will clarify the applicability of the so-called antinepotism statute.

Just to say a little bit on that statute, it seems to me that it is very logical that we should not place persons of such close consanguinity on the same court that overviews 50 million people. Surely we can find people other than sons of mothers on the court. So Senator KYL has made a splendid effort to try to resolve this matter. He indicated in our Judiciary Committee this morning that, as a matter of principle, he would have to vote against Professor Fletcher because he feels that the statute does apply. I tried to resolve it by chatting with Judge Betty Fletcher who has agreed to take senior status upon her son's confirmation.

Now that these obstacles have been removed, I am pleased that we are voting on Mr. Fletcher and would like to express my considered view that he should be confirmed.

I am the first to say that I may not agree with all of Professor Fletcher's views on Federal courts and procedure, the separation of powers, or constitutional interpretation. But the question is not whether I agree with all of his views, or whether a Republican President would or would not nominate such a candidate. The President is entitled to have his nominees confirmed, provided that the nominee is well qualified and will abide by the appropriate limitations on Federal judges.

I recognize that this is especially important for nominees to the Ninth Circuit and concur wholeheartedly with those of my colleagues who believe that the Ninth Circuit has literally gone out of control. I agree with the distinguished Senator from Alabama that that circuit is out of line and out of control. It is often reversed. It has a 75 percent reversal rate over the last number of decades because of these activist judges on that bench. But Professor Fletcher has personally assured me that he would follow precedent, that he would interpret and enforce the law, not make laws from the bench.

I believe Professor Fletcher is a man of honor and integrity and that he will live up to his word and, in fact, I hope Professor Fletcher, who is an expert on civil procedure, can actually help rein in some of the more radical forces on the Ninth Circuit Court of Appeals.

Professor Fletcher clearly is highly qualified. He is a graduate of the Yale Law School, he clerked for a Supreme Court Justice, and is considered an eminent legal scholar. That consideration is justified. Although some of his writings may push the envelope of established legal thinking, as often happens in the case of professors of law, we should recognize that this is the role of academics. I made that point during the Bork nomination when my colleagues on the other side were finding fault with many of the positions that Judge Bork had taken in some of his writings, many of which he repudiated later, but all of which were provocative and intended to create debate on the respective subjects.

In short, I believe Professor Fletcher is within the mainstream of American legal thought just as several Republican nominees such as Antonin Scalia, Frank Easterbrook, Richard Posner, and Ralph Winter were when they were nominated, and this body should confirm him today.

I hope my colleagues will confirm Professor Fletcher.

Today the Judiciary Committee voted out 15 judicial nominees and 4 U.S. attorneys. This year we have held hearings for 111 out of 127 nominees.

If all of the judges who are now pending on the Senate floor are confirmed, as I expect they will be, we will end this Congress having confirmed 106 judges, resulting in a vacancy rate of 5.4 percent. This will be the lowest vacancy rate since the judiciary was expanded in 1990.

Also, over 50 percent of the judges confirmed this year, to date, by this Republican Senate have been women and/or minorities.

Given the fact that over the last five Congresses the average number of article III judges confirmed is 96, I think this Republican majority has done very well to this point, and will continue to do so. Can we do better? Always. I am sure we can. And we will certainly try to do better during this coming year, and I intend to do better during the coming year.

At this particular point, we are concerned about Professor William Fletcher, who I believe is highly qualified for this job. Even though I don't agree with him on everything that he believes, or everything that he has taught, the fact of the matter is he is qualified, he is a decent man, and he should be confirmed here today.

Although Professor Fletcher's nomination has taken quite a while to be brought up for a vote, I do not think anyone can fairly criticize the work the Judiciary Committee has done this year, especially during the last few weeks of this session. On Tuesday of this week, Senator SPECTER chaired a hearing for 11 nominees. Nine of those 11 nominees were received by the Committee only within the last month. I am told that, according to the Department of Justice, the hearing Senator SPECTER chaired broke a record for the most nominees on a single hearing.

To date, the Republican Senate has already confirmed 80 judges. And today, that number will rise to 84, if Professor Fletcher and the other judges that will be brought up for a vote are confirmed—as I wholly expect they will. As I stated earlier, if all of the nominees now pending on the Senate floor are confirmed, the Senate will adjourn having confirmed 106 Article III judges.

Again, this will leave a judicial vacancy rate of only 5.6 percent. Keep in mind that the Clinton administration is on record as having stated that a vacancy rate of just over 7 percent is considered virtual full employment of the Federal judiciary.

I do not think anyone can legitimately argue that the Judiciary Committee has not done its job well. Yes, there have been some controversial Clinton nominees that have moved slowly or not at all, but sometimes nominees come to the Committee with problems that prevent their nominations from going forth. I am pleased to say that although some thought the problems relating to Professor Fletcher's nomination could not be worked out, they ultimately have been. I fully expect that Professor Fletcher will be confirmed today and I will vote for him.

The PRESIDING OFFICER. Who yields time?

Mr. HATCH. How much time does the distinguished Senator from Washington desire? I yield 5 minutes or such time as he needs to the distinguished Senator from Washington.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Mr. President, I share the background of the Senator from Alabama as attorney general of my State. I agree with much of the philosophic underpinning of his remarks directed at the judicial philosophy of Mr. Fletcher. I disagree, however, as to the conclusion, and intend to vote for his confirmation.

The Constitution of the United States says that the President shall nominate and by and with the advice of the Senate shall appoint judges to positions like the one we are debating here today.

In my view—I have some differences even with my good friend from Utah on

this subject—I believe that does permit a Senator to vote against a judicial nominee on the grounds that the Senator disagrees with the fundamental legal philosophy of that nominee. I also believe, however, that when the President has sought the advice as well as the consent of the Senate, and when that advice has been heated, at least to the extent of being given significant weight, it is then appropriate to vote for the confirmation of a judicial nominee, even though one, as an individual Senator, might well not have nominated that individual had he, the Senator, been President of the United States.

That is the situation in which I find myself here. I have met with and talked about Mr. Fletcher's ambitions on two or three occasions at some length. I have found him to be a thoughtful, intelligent, hard-working individual dedicated to the law as he sees it, and, perhaps even more importantly than that, as the Constitution and the statutes of the United States lay it out.

He would certainly not have been my first choice had I been the nominating authority in this case. But, I am not. I am an individual Senator. At the same time, the President of the United States and his officers have, in fact, sought my advice as well as my consent on judicial nominees, both to the district courts in the State of Washington, and to the Ninth Circuit Court of Appeals when those nominees come from the State of Washington.

While again I have not necessarily gotten my first choices for those positions, I believe that in a constitutional sense my advice has been sought and my advice has been given considerable weight by the President of the United States.

As a consequence, the combination of the punctual adherence to constitutional requirements with my own belief that Mr. Fletcher will fill the position of a judge on the Ninth Circuit honorably, and in accordance with the Constitution and laws of the United States, causes me to feel that he is a qualified nominee and that he should be confirmed by the Members of the Senate to the office to which the President has nominated him.

The PRESIDING OFFICER. Who yields time?

Mr. LEAHY. Mr. President, I yield to the distinguished Senator from California. She requires how much time?

Mrs. FEINSTEIN. I thank the distinguished manager. May I have 10 minutes?

Mr. LEAHY. I yield 10 minutes to the distinguished Senator from California.

Mrs. FEINSTEIN. I thank the Senator from Vermont.

Mr. President, I rise to voice my strong support for the nomination of Professor William Alan Fletcher to the Ninth Circuit Court. I very much appreciate the views of the chairman of the committee, the distinguished Senator from Utah, on this, and his considered judgment that Mr. Fletcher deserves approval by this body. And I hope, indeed, that will be the case.

Mr. Fletcher has been before this body for over 3 years now. He has had two Judiciary Committee hearings. I had the pleasure of attending both and listening to him. His responses at these hearings were crisp, to the point, direct, and showed a depth and breadth of knowledge of the law that I think is among the top one percent of those nominees who came before the committee.

His credentials are impeccable. As the chairman pointed out, they include: magna cum laude graduate of Harvard; Rhodes scholar; law degree from Yale; service in the Navy; law clerk for U.S. Supreme Court Justice William Brennan; and a clerkship for District Court Judge Stanley Weigel.

Since 1977, he has been a distinguished professor at the Boalt Hall School of Law at the University of California, where he won the 1993 Distinguished Teacher Award and has come to be regarded as one of the most foremost experts on the Federal court and the Constitution.

Mr. President, since the distinguished Senator from Alabama raised some concerns about this nominee, I would like to respond to some of those concerns. We asked Mr. Fletcher to respond, and, in fact, he provided us with a response on a number of items that have been raised by Mr. Thomas Jipping, of the Judicial Selection Monitoring Project, and subsequently repeated.

The first allegation is what was called the ''discretionary Constitution.'' Mr. Jipping attributes to Professor Fletcher the conclusion:

> When judges think that the political branches are not doing what they should, judges have the discretionary power to do it for them.

And he states:

> Mr. Fletcher writes that this virtually unlimited judicial discretion is a ''legitimate substitute for political discretion'' when the political branches are ''in default.''

I would like to give you directly the statement from Mr. Fletcher.

The article says quite the opposite of what Mr. Jipping wrote. I do not believe in a ''discretionary Constitution.'' As the article makes plain, I view judicial discretion as a problem rather than a solution. Further, I did not write that judicial discretion is legitimate when political branches are ''in default.'' Rather, I wrote that the exercise of judicial discretion in curing constitutional violations in institutional suits is ''presumptively illegitimate'' unless the political bodies that should cure those violations are in ''serious and chronic default.''

I would like to put all of this in the RECORD.

On the second point that has been raised critically, on standing, Mr. Fletcher writes:

> Contrary to what Mr. Jipping wrote, I do not believe Congress can write statutes that allow anyone or anything to sue. Indeed, in some cases I take a narrower view of standing than the Supreme Court. For example, I argued that the Court should not have granted standing in Buckley v. Valeo. My position on standing would not drastically expand caseloads. Further, rather than inviting judges to legislate from the bench, I am particularly anxious that the Federal courts not perform as a ''super-legislature.''

The third point that he has been criticized for is the unconstitutionality of statutes. The critic writes:

> Mr. Fletcher believes that judges can declare unconstitutional legislation they believe was inadequately considered by Congress. He argues that a statute effectively terminating lawsuits against defense contractors by substituting the United States as the defendant was passed without hearings and based on what he believes are misrepresentations about its operation. That alone would be sufficient to strike down the statute.

Now, this is Mr. Fletcher's response:

> I believe no such thing. I argued that the presumption of constitutionality normally accorded to a statute should not be accorded to the Warner Amendment, based on the following factors: (1) The only body in Congress that considered the amendment was a subcommittee of the House Judiciary Committee, which held hearings and concluded that it was unconstitutional; (2) When the amendment was later attached as a rider to an unrelated defense appropriations bill, it was consistently described as doing the opposite of what it actually did.

And so, if I might, to clear these things up, Mr. Fletcher has submitted to us a draft response, and I ask unanimous consent to have printed in the RECORD both the allegations and the responses.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

DEAR SENATOR FEINSTEIN: I write to correct some mischaracterizations of my writing that have been put forward by Mr. Thomas Jipping.

The most extensive misrepresentations are contained in Mr. Jipping's May 10, 1996, op-ed piece in The Washington Times. I will take them in order.

(1) JUDICIAL DISCRETION

Mr. Jipping wrote: ''First, Mr. Fletcher believes in what he has called a ''discretionary Constitution.'' In fact, that was the title of his first law review article. When judges think the political branches are not doing what they should, judges have the discretionary power to do it for them. Mr. Fletcher writes that this virtually unlimited judicial discretion is a ''legitimate substitute for political discretion'' when the political branches are ''in default.'' Not surprisingly, judges get to determine when the political process has defaulted. Today courts are running prison systems, school districts and even mental institutions in the name of such discretion.'' The article Mr. Jipping refers to is ''The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy,'' 91 Yale L.J. 635 (1982).

Brief statement: The article says quite the opposite of what Mr. Jipping wrote. I do not believe in a ''discretionary Constitution.'' As the article makes plain, *I view judicial discretion as a problem rather than a solution*. Further, I did not write that judicial discretion is legitimate when political branches are ''in default.'' Rather, I wrote that the exercise of judicial discretion in curing constitutional

violations in institutional suits is ''presumptively *illegitimate*'' unless the political bodies that should cure those violations are in ''*serious and chronic default*.'' at pp. 637, 695 (emph. added).

Extended analysis: The article analyzed institutional injunctions where there has already been a finding of unconstitutionality in the operation of a prison or mental hospital, in the apportionment of a legislature, or in the racial segregation of public schools. After there has been a finding of a constitutional violation, the question arises: Who should decide how that violation should be cured? Even where there has been a constitutional violation, I argue that the role of the federal courts should be severely circumscribed, and that judicially formulated injunctions should be regarded as presumptively illegitimate.

Constitutional violations in institutional cases can be cured in many ways. For example, in a prison case where conditions of confinement violate the Eighth Amendment, a prison administrator can do a number of different things to bring the prison into compliance with the Constitution. Or in a reapportionment case a state legislature can draw district lines in a number of different ways to bring the districts into compliance with the Fourteenth Amendment. Choices among the possible remedies inescapably involved the exercise of discretion, and should be regarded as presumptively illegitimate if made by a judge rather than a political entity. I wrote: ''Trial court remedial discretion [in institutional suits] can to some degree be controlled in the manner of its exercise; in some cases it may even be eliminated without sacrificing unduly the constitutional or other values at stake. But there comes a point where certain governmental tasks, whether undertaken by the political branches or the judiciary, simply cannot be performed effectively without a substantial mount of discretion. * * * The practical inevitability of remedial discretion in performing those tasks defines the legitimate role of the federal courts. * * * *[S]ince trial court remedial discretion in institutional suits is inevitably political in nature, it must be regarded as presumptively illegitimate.*'' at pp. 636–37 (emph. added).

In *Swann* v. *Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971), Chief Justice Burger wrote for the Court that the district court has the power to fashion an institutional injunction only ''*[i]n default by the school authorities* of their obligation to proffer acceptable remedies'' (emph. added). I argued that ''default'' by the political authorities—which in the view of the Supreme Court justified a judicially fashioned injunction—should be found only as a last resort. I wrote. ''Political bodies and courts respond to different institutional imperatives. * * * As a matter of fundamental structure, even where a constitutional violation has been found, a court cannot legitimately resolve such a problem *unless the political bodies that ordinarily should do so are in such serious and chronic default that here is realistically no other choice.*'' at p. 695 (emph. added).

My argument is neither liberal not activist. Indeed, my formulation is more conservative and restrained than Chief Justice Burger's in Charlotte-Mecklenberg, where he required that school authorities simply be ''in default.'' I recommended increasing the threshold for judicial action by requiring that the political body be in ''such serious and chronic default that there is realistically no other choice.''

Throughout the article, I emphasized the danger in judicial overreaching: ''[A] federal court is not, and should not permit itself the illusion that it can be, anything more than a temporarily legitimate substitute for a political body that has failed to serve its function. '' at 969.

(2) STANDING

Mr. Jipping wrote: ''Second, the Constitution limits court jurisdiction to 'cases' and 'controversies.' One way to assure this jurisdiction is to demand that plaintiffs concretely trace their injury to the defendant's action, preventing judges from reaching out to decide issues and make law in the abstract. In a 1988 article, Mr. Fletcher argues that standing is merely a way of looking at the merits of a case rather than assuring a court's jurisdiction. As such, he believes that Congress can write statues that allow anyone or anything to sue, regardless of whether plaintiffs have suffered any harm at all. This view would drastically expand federal court caseloads and give judges innumerable opportunities to legislate from the bench.'' The article Mr. Jipping refers to is ''The Structure of Standing,'' 98 Yale L.J. 221 (1988).

Brief statement: Contrary to what Mr. Jipping wrote, I do not believe Congress can write statutes that allow anyone or anything to sue. Indeed, in some cases I take a narrower view of standing than the Supreme Court. For example, I argued that the Court should not have granted standing in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). My position on standing would not drastically expand caseloads. Further, rather than inviting judges to legislate from the bench, I am particularly anxious that the federal courts not perform as a ''super-legislature.''

Extended analysis: The article sought to bring some intellectual order to an area of doctrine long criticized as incoherent. I agreed with Justice Harlan that standing as presently articulated is ''a word game played by secret rules.'' *Flast* v. *Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) at 221. My concern was not to argue for different results in standing cases, but rather to provide a coherent intellectual structure that would support those results. As I wrote, *''[W]e mistake the nature of the problem if we condemn the results in standing cases.*'' at 223 (emph added).

In my view, Justice Douglas' opinion in *Association of Data Processing Service Org.* v. *Camp*, 397 U.S. 150 (1970), is the source of much of the analytical difficulty. I stated, ''More damage to the intellectual structure of the law of standing can be traced to Data Processing than to any other single decision.'' at 229. In essence, I argued that standing doctrine should return to what it had been at the beginning of this century, when a plaintiff in federal court has to state a cause of action, and the focus was on the particular statutory or constitutional provision invoked by plaintiff. Under this earlier approach, a plaintiff has to show that he was entitled to relief ''on the merits,'' in the sense not only that defendant violated a legal duty but also that plaintiff had a legal right to judicial enforcement of that duty.

In a few cases, I disagreed with results reached by the Supreme Court. In those few cases, I generally viewed standing more narrowly than the Court and would have denied standing. The most important such case is *Buckley* v. *Valeo*, 424 U.S. 1 (1976). I did not criticize the substance of the Court's decision, but I did criticize its grant of standing.

In *Buckley*, the Court sustained a statutory grant of standing to any person eligible to vote for President to challenge on any constitutional ground the Federal Election Campaign Act of 1971. Plaintiffs included Senator Buckley who had introduced the standing provision in the Senate. They challenged the Act under the statutory grant of standing; the District Court certified twenty-two constitutional questions to the Supreme Court; and the Court answered all of them. I wrote: ''[I]f the twenty-two certified questions answered in *Buckley* had been sent to the Court in a letter from the Senate floor, as the twenty-nine questions in *Correspondence of the Justices* were sent to the Court in a letter from Secretary of State Jefferson[, i]t is unthinkable that the Court would have answered them. Yet when Congress cast the questions in the form of a lawsuit granting standing to one of its members, the Court in *Buckley* willingly provided the answers, *performing*, in Judge Leventhal's words, *in a ''role resembling that of a super-legislature.''* The lessons of *Buckley* are sobering. Not only will the Court answer questions that have proven particularly difficult for Congress. It will also answer them in the highly abstract form traditionally thought particularly ill-suited for judicial resolution.'' at 286 (emph. added). My approach to standing could hardly be clearer: I argued that the Court should not have granted standing and should not have acted as a ''super-legislature.''

(3) UNCONSTITUTIONALITY OF STATUTES

Mr. Jipping wrote: ''Third, Mr. Fletcher believes that judges can declare unconstitutional legislation they believe was inadequately considered by Congress. He argues that a statute effectively terminating lawsuits against defense contractors by substituting the United States as the defendant was passed without hearings and based on what he believes are misrepresentations about its operation. That alone would be sufficient to strike down the statute.'' The article Mr. Jipping refers to is ''Atomic Bomb Testing and the Warner Amendment: A Violation of the Separation of Powers,'' 65 Wash. L. Rev. 285 (1990).

Brief statement: I believe no such thing. I argued that the presumption of constitutionality normally accorded to a statute should not be accorded to the Warner Amendment, based on the following factors: (1) The only body in Congress that considered the Amendment was a subcommittee of the House Judiciary Committee, which held hearings and concluded that it was unconstitutional; (2) when the Amendment was later attached as a rider to an unrelated defense appropriations bill, it was consistently described as doing the opposite of what it actually did.

Elimination of the presumption does not mean that a statute is unconstitutional. A statute is unconstitutional only if it independently violates some provision of the Constitution. I did not argue—and do not believe—that inadequate consideration by Congress ''alone would be sufficient to strike down a statute.''

Extended analysis: At the outset, I note that I wrote the article as an advocate for the American military veterans and civilian downwinders. My involvement as advocate is indicated at the beginning of the article at 285, *fn.

Between 1946 and 1963, the United States conducted a little over 300 atmospheric tests of atomic bomb, about 200 of them in Nevada. Over 200,000 soldiers and an undetermined number of civilians were exposed to significant amounts of radiation during the tests. Atmospheric tests were discontinued in 1963 after the United States signed a test ban treaty. In the 1980s, a number of suits were filed against the private contractors who had assisted the government in the tests. Seeking to short-circuit the suits, the contractors sought a statute that would protect them. Joined by the executive branch, they sought a statute that would substitute the United States as a defendant in their place, and would then permit the United States to obtain a dismissal on grounds of sovereign immunity.

In 1983, a subcommittee of the House Judiciary Committee held hearings on the proposed statute and issued a written report concluding that it would be unconstitutional. The following year, Senator Warner attached the proposed statute as a rider to a defense appropriation bill. The conference committee report said that the amendment ''would provide remedy against the United States,'' even though it was clear that the intent, and ultimate effect, would be to deprive the plaintiffs of any remedy at all. After the passage of the Amendment, the District Court substituted the United States as a defendant and dismissed the suits. *In re Consolidated United States Atmospheric Testing Litigation,* 616 F.Supp. 759 (N.D. Calif. 1985), aff'd sub nom. *Konizeski* v. *Livermore Labs,* 820 F.2d 982 (9th Cir. 1987), cert. den., 485 U.S. 905 (1988).

I argued that the Warner Amendment violated separation of powers by interfering with the judicial function in violation of *United States* v. *Klein,* 80 U.S. 128 (1872). I contended the Warner Amendment should not enjoy the normal presumption of constitutionality: ''[C]ourts ordinarily accord a strong presumption of constitutionality to any legislation that is enacted in accordance with the formally required process. *We should be very reluctant to abandon the presumption when a statute has fulfilled the formal prerequisites,* but in certain circumstances such an abandonment may be justified. . . . [In the case of the Warner Amendment] we have . . . affirmative evidence that *the one body in Congress that seriously considered the amendment found it unconstitutional.* Moreover, we know that the bill was passed thereafter only by avoiding hearings and misrepresenting the bill's character. Under such circumstances, the Warner Amendment can hardly lay claim to the traditional presumption in favor of a statute's constitutionality.'' at 320 (emph. added).

(4) SEPARATION OF POWERS

Mr. Jipping wrote: ''Finally, Mr. Fletcher rejects perhaps the most important limitation on government power established by the Constitution's framers, the separation of powers. The Supreme Court has said what the Framers said, namely, that each branch has relatively defined and exclusive areas of authority and power. In a 1987 article, Mr. Fletcher condemned these decisions as 'fundamentally misguided'. Why? The Court 'read the Constitution in a literalistic way to upset what the other two branches had decided, under the political circumstances, was the most workable arrangement.' In other words, political circumstances can trump constitutional principles.'' The article Mr. Jipping refers to is a review of Chief Justice Rehnquists's book, The Supreme Court: How It Was, How It Is, 75 Calif.L.Rev. 1891 (1987).

Brief statement: I do not reject separation of powers. Indeed, I relied on separation of powers to argue the unconstitutionality of the Warner Amendment, calling it a ''vital check against tyranny.'' 65 Wash.L.Rev. at 310. In the review I criticized two separation of powers decisions by the Supreme Court, *Immigration and Naturalization Service* v. *Chadha,* 462 U.S. 919 (1983), and *Bowsher* v. *Synar,* 478 U.S. 385 (1986), in which the Court found unconstitutional two Acts of Congress. Believing in judicial restraint, Justice White dissented because he found no clear constitutional text invalidating what Congress had done. I agreed with Justice White.

Extended analysis: In *Immigration and Naturalization Service* v. *Chadha,* the Supreme Court struck down the use of the one-house veto by Congress. In *Bowsher* v. *Synar,* the Court struck down the Gramm-Rudman-Hollings Act providing for federal deficit reduction. I wrote: ''I think both decisions fundamentally misguided, for essentially the reasons given by Justice White in his dissenting opinions. . . . Justice White pointed out that [*Chadha*] invalidated, at one stroke, almost 200 statutes on the basis of a highly debatable reading of the Constitution. Invoking Justice Jackson's emphasis on a 'workable government' in his concurrence in the *Steel Seizure Case,* Justice White reminded the Court that the 'wisdom of the Framers was to anticipate that . . . new problems of governance would require different solutions.' . . . Justice White, [dissenting in *Bowsher*], again invoked Justice Jackson's view of the Constitution as a charter for a 'workable government,' and objected to what he saw as the Court's 'distressingly formalistic view' in attaching dispositive significance to what should be regarded as a triviality.'' at 1894.

Justices White and Jackson firmly believed in a non-activist judiciary. As a matter of interpretive principle, they deferred to the judgment of the political branches unless the clear text of the Constitution commanded otherwise. I agree with them.

I thank you for the opportunity to correct these mischaracterizations.

Very truly yours,

WILLIAM A. FLETCHER.

Mrs. FEINSTEIN. Mr. President, University of California law professor Charles Alan Wright, one of the Nation's leading conservative constitutional scholars, had this to say about Dr. Fletcher:

Too many scholars approach a new issue with preconceptions of how it should come out and they force the data that their research uncovers to support the conclusion that they had formed before they did the research. I think that is reprehensible for a scholar and it is dangerous for a judge.

I am completely confident that when Fletcher finishes his service on the ninth circuit we will say not that he has been a liberal judge or a conservative judge but that he has been an excellent judge, one who has brought a brilliant mind, greater powers of analysis, and total objectivity to the cases that came before him.

I believe that the nomination of William Fletcher will add strength to the ninth circuit and I hope very much that he is confirmed.

I would like to also quote Stephen Burbank of the University of Pennsylvania Law School:

His work is both analytically acute and painstaking in its regard for history. Indeed, love of and respect for history shine through all his work, as the history itself illuminates the various corners of the law he enters.

Interestingly enough, the New Republic wrote in an editorial in 1995:

Fletcher is the most impressive scholar of Federal jurisdiction in the country. His path-breaking articles on sovereign immunity and Federal common law have transformed the debates in these fields; and his work is marked by the kind of careful historical and textual analysis that should serve as a model for liberals and conservatives alike. If confirmed, Fletcher will join his mother—

And as we know now his mother is going to take senior status —

but his judicial philosophy is more constrained than hers. We hope he is confirmed as swiftly as possible.

That was back in 1995 when he was nominated. It is now almost the end of 1998, and as this man has gone through the scrutiny of 3 years of delay, I must say I very much hope that this body will confirm him this afternoon. I believe, as another has said, that he will, in fact, be an excellent, thoughtful and commonsense judge.

I thank the Chair. I yield the floor.

Mrs. BOXER. Mr. President, I am very happy to finally have the opportunity to come to the floor today and vote on the nomination of Professor William Fletcher to the U.S. Court of Appeals in the Ninth Circuit. I urge my colleagues in the Senate to vote for Professor Fletcher, who is eminently qualified to serve on the federal appeals court. Professor Fletcher was first nominated on April 26, 1995. He had a hearing and was reported out in May of 1996, and has been patiently waiting for a debate and vote on his nomination ever since.

Some members of the Senate oppose this nomination because his mother sits on this court. However, his mother, the Honorable Betty Fletcher, has already agreed to take senior status and not sit on panels with her son if he is confirmed. So, again, I am very happy to once again exercise my duties as a U.S. Senator and cast a vote on the nomination of a federal judge.

To give a little history, the 104th Congress never acted on Professor Fletcher's nomination the first time, so he had to be renominated on January 7, 1997. He waited more than a year for a second hearing, and has continued to wait for a confirmation vote, until today. One look at his record, and I am sure my colleagues will see that Professor Fletcher is eminently qualified to sit on the federal bench, and deserves swift Senate confirmation.

In 1968, Professor William Fletcher received his undergraduate degree, magna cum laude, from Harvard College. He spent the next two years at Oxford University on a Rhodes Scholarship, receiving another B.A. in 1970. After Oxford, he spent the following two years on active duty military service in the United States Navy. He was honorably discharged as a Lieutenant in 1972. Professor Fletcher then attended Yale Law School, graduating in 1975. While at Yale, he was a member of the Yale Law Journal.

After graduating from law school, Professor Fletcher clerked for a year for U.S. District Judge Stanely A. Weigel in the Northern District of California, and another year for U.S. Supreme Court Justice William J. Brennan, Jr. He began teaching at the University of California, Berkeley, School of Law, also known as Boalt Hall, in the fall of 1977, immediately after his second clerkship. While at Boalt Hall, Professor Fletcher has been teaching a broad range of courses, including Property, Administrative Law, Conflicts, Remedies, and Constitutional Law.

Professor Fletcher is widely praised by his students and his fellow academics for his fair-minded and balanced approach to legal problems. He promises to bring the same careful fair-mindedness to the federal bench.

I believe professor Fletcher will make an exceptional addition to the federal bench. I believe his intelligence, broad experience, and professional service qualify him to sit on the federal bench with great distinction. I am sure my Senate colleagues will be equally impressed, and I urge my colleagues to vote for his confirmation.

Mr. SESSIONS addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama is recognized.

Mr. SESSIONS. I yield up to 10 minutes to the distinguished Senator from Ohio.

The PRESIDING OFFICER. The Senator from Ohio is recognized.

Mr. DEWINE. Mr. President, I rise this afternoon to oppose the nomination of William Fletcher to be a U.S. Circuit Court judge for the Ninth Circuit. On May 21, 1998, the Senate Judiciary Committee favorably reported out this nominee by a vote of 12 to 6.

I voted against the nominee. I would like to take a moment this afternoon to explain to my colleagues in the Senate why I voted no on that date and why I intend to vote no today. I intend to vote no today, Mr. President, and I base my opposition on the fact that Mr. Fletcher's writings and statements simply do not convince me that he will help to move the Ninth Circuit closer to the mainstream of judicial thought. And that is the criteria that I applied and will continue to apply in regard to the Ninth Circuit.

Although some Senators oppose this nominee because of their reading of the antinepotism statute and their concerns in that area, the fact that Mr. Fletcher's mother also serves on the Ninth Circuit, who, as my colleague pointed out, will take senior status, does not trouble me. As I said in the Judiciary Committee, I am not in favor of legislation that, based on family relationships, restricts the power of the President or the power of the Senate to either nominate or confirm judges.

Having said that, Mr. President, let me restate what does concern me about this nomination. All of us—all of us—should be concerned about what has been going on in the Ninth Circuit over the last few years. Based on the alarming reversal rate of the Ninth Circuit, I have said before and I will say it again for the RECORD today, I feel compelled to apply a higher standard of scrutiny for Ninth Circuit nominees than I do for nominations to any other circuit.

Mr. President, I will only support nominees to the Ninth Circuit who possess the qualifications and whose background shows that they have the ability and the inclination to move the circuit back towards the mainstream of judicial thought in this country. Before we consider future Ninth Circuit nominees, I urge my colleagues to take a close look at the evidence, evidence that shows that we have a judicial circuit today that each year continues to move away from the mainstream.

I believe the President of the United States has very broad discretion to nominate to the Federal bench whomever he chooses, and the Senate should give him due deference when he nominates someone for a Federal judgeship. However, having said that, the Senate does have a constitutional duty to offer its advice and consent on judicial nominations. Each Senator, of course, has his or her own criteria for offering this advice and consent. However, given that these nominations are lifetime appointments, all of us take our advice and consent responsibility very seriously.

We should keep in mind that the Supreme Court of our country has time to review only a small number of decisions from any circuit. That certainly is true with the Ninth Circuit as well. This means that each circuit, the Ninth Circuit in this case, in reality is the court of last resort. In the case of the Ninth Circuit, they are the court of last resort for the 45 million Americans who reside within that circuit. To preserve the integrity of the judicial system for so many people, I believe we need to take a more careful look at who we are sending to a circuit that increasingly—increasingly—chooses to disregard precedent and ultimately just plain gets it wrong so much of the time.

Consistent with our constitutional duties, the Senate has to take responsibility for correcting this disturbing reversal rate of the Ninth Circuit. I think we have an affirmative obligation to do that. And that is why I will only support those nominees to the Ninth Circuit who possess the qualifications and who have clearly demonstrated the inclination to move the circuit back towards the mainstream.

Mr. President, I will want to apply a higher standard of scrutiny to future Ninth Circuit nominees to help ensure that the 45 million people in that circuit receive justice, and justice that is consistent with the rest of the Nation, justice that is predictable and not arbitrary nor dependent on the few times the Supreme Court reviews and ultimately reverses an erroneous Ninth Circuit decision.

I yield the floor.

The PRESIDING OFFICER (Mr. SESSIONS). The Senator from Vermont.

Mr. LEAHY. Mr. President, I reserve our time on this side. I know on the other side the Senator from Missouri, I assume, will speak on their time. I will withhold my statement. I am kind of stuck here anyway. I yield to the Senator from Missouri, on their time.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. ASHCROFT. Mr. President, with the permission of the Senator from Alabama, I yield myself as much time as I might consume in opposition to the nomination.

The PRESIDING OFFICER. The Senator is recognized.

Mr. ASHCROFT. Mr. President, the Ninth Circuit Court of Appeals is in serious need of improvement. The court is the epicenter of judicial activism in this country. The Ninth Circuit's unique blend of distortion of text, novel innovation, and disregard for precedent caused it to be reversed by the U.S. Supreme Court 27 out of 28 cases in the term before last. That is something very, very serious. When this court's cases were considered by the U.S. Supreme Court in the term before last, 27 out of 28 decisions were considered to be wrong.

If the people of this country found out that 27 out of 28 decisions of the Senate were considered to be wrong, Senators would not last very long. No tolerance would be provided for virtually any institution that was wrong that much of the time. The Ninth Circuit Court's record improved last year, but barely. According to the National Law Journal, the court was reversed in whole or in part in 14 out of 17 cases last year. Over the last 2 years, that amounts to a reversal rate of 90 percent. In the last 2 terms, 9 out of 10 times the Ninth Circuit has been wrong.

The Ninth Circuit's disastrous record before the Supreme Court has not been lost on the Justices of the Supreme Court. In a letter sent last month supporting a breakup of the Ninth Circuit, Justice Scalia cited the circuit's ''notoriously poor record on appeal.'' Justice Scalia explained, ''A disproportionate number of cases from the Ninth Circuit are regularly taken by this court for review, and a disproportionate number reversed.''

The Ninth Circuit's abysmal record cannot be dismissed or minimized because the Supreme Court is there to correct the Ninth Circuit's mistakes. In a typical year, the Ninth Circuit disposes of over 8,500 cases. In about 10 percent of those cases, over 850 cases, the losing party seeks to have a review in the Supreme Court. Although appeals from the Ninth Circuit occupy a disproportionate share of the docket, the Supreme Court grants only between 20 and 30 petitions from the Ninth Circuit in a given year. If they are reversed 90 percent of the time because they are wrong in those cases that have been accepted, I do not know what the error rate would be in the other 8,500 cases that they litigate or consider on appeal, or what would be the error rate in the 850 cases that are sent, begging the Supreme Court to review the cases. But it is very likely, in my judgment, if their error rate is 90 percent in those cases that are accepted by the Supreme Court, that there are a lot of other individuals simply denied justice because of the extremely poor quality of the Ninth Circuit Court of Appeals.

This really places upon those of us in the U.S. Senate a very serious responsibility, a responsibility of seeking to improve the quality of justice that people who live in the Ninth Circuit receive. Accordingly, of the 8,500 cases decided by the Ninth Circuit in a year, only 20 or 30, or about three-tenths of 1 percent, are reviewed by the Supreme

Court. So, if there are errors in the other cases, they are just going to remain there.

Only three-tenths of 1 percent of the cases decided by the court are reviewed by the Supreme Court. So if we say it is OK for that circuit to be full of error, it is OK for that circuit to be absent the quality and the kind of correctness that is appropriate in the law, if we predicate our approval on the basis that there can be an appeal, the truth of the matter is, the Supreme Court takes only about three-tenths of 1 percent of the cases for appeal.

The Supreme Court, moreover, selects cases for review predominantly to resolve splits among the circuits, not to correct the most egregious errors. So some of the cases the Supreme Court does not even take may be more blatant injustices than the ones that the Supreme Court does take, because the Supreme Court is trying to resolve differences between the Ninth Circuit and the Second Circuit, or the Eighth Circuit and the Ninth Circuit, or something like that. So we have a real shortfall of justice that exists as a potential whenever we have a court that is so error ridden, and its error-ridden nature is demonstrated because of the correction responsibility that has to be exercised by the U.S. Supreme Court.

The truth of the matter is, for virtually all litigants within the Ninth Circuit, the decisions of the Ninth Circuit are the final word. How would you like knowing that you were going to court and that the appellate court which would oversee your day in court was reversed 90 percent of the time when it was considered by the Supreme Court, but you only had a three-tenths of 1 percent chance of getting an injustice in your case reversed because the Supreme Court only takes three-tenths of 1 percent of the cases? I think America deserves to have more confidence in its judicial system than that.

The Ninth Circuit is an activist court in desperate need of therapy and help. After a thorough review of its record, it is my judgment that Professor Fletcher would do more harm than good in the Ninth Circuit, would move that court further outside the judicial mainstream.

There has been a great deal of discussion about the applicability of Federal antinepotism statutes to this nominee. I commend individuals for raising this issue. It is critical to the respect for law.

I have heard some people say they do not really care whether this is against the law or not. Frankly, I think we ought to care. I think a disregard for the law, especially as it relates to the appointment of judges, is a very, very serious matter. It is critical to the respect for law in a society as a whole that we in the Senate respect the laws that apply to us.

However, one of the principles of judicial restraint identified by Justice Brandeis many years ago is that a court should not decide a difficult constitutional or statutory question if there is another straightforward basis for resolving the case. Applying that principle to this nomination, I have concluded that whether or not the statute precludes confirmation of Professor Fletcher, there is ample basis in the record to suggest that Professor Fletcher would exacerbate the Ninth Circuit's activism and I plan to oppose his nomination on that basis.

A number of Professor Fletcher's writings suggest a troubling tendency toward judicial activism. For example, Professor Fletcher has written in praise of Justice Brennan's mode of constitutional interpretation. He also has criticized the Supreme Court for reading the Constitution in a literalistic way. This is troubling, to say the least. Justice Brennan, as even his admirers would admit, is the godfather of the evolving Constitution and the primary critic of the literal reading of the constitutional text.

You know, there are those who believe the Constitution can be stretched, and grows, and amends itself to mean what someone wants it to mean at the time a crisis arises. I reject that. I reject Brennan's approach. Professor Fletcher embraces it. Those who believe that the Constitution can be an evolutionary document really are those who would be able to put their stamp of meaning anywhere they want anytime they choose.

The debate over whether evolving standards of decency or the text should guide judicial decisions is at the heart—the very heart—of my concern over judicial activism. Nowhere in the country is the Constitution ''evolving'' more rapidly than in the Ninth Circuit. We cannot afford to send another activist to this court.

Although a number of Professor Fletcher's writings focus on relatively esoteric subjects, they display a disturbing tendency toward activism on the issues addressed.

He has criticized the current limitations on standing and has advocated an approach that would focus more on the legislative intent—an inherently dubious guide—and would afford standing to plaintiffs excluded by the current doctrine.

Likewise, he has written that the procedural history of an amendment's enactment can lessen the presumption of constitutionality that would otherwise attach to the enactment. Frankly, we ought to be evaluating the constitutionality on the basis of the Constitution, not the procedural history. This is particularly disturbing in light of the Ninth Circuit's apparent tendency to apply a presumption of unconstitutionality to popular initiatives and other legislation the judges dislike on policy grounds.

In an opinion piece written in the midst of Justice Thomas' confirmation process, Professor Fletcher wrote that ''the Senate must insist nominees articulate their constitutional views as a condition of their confirmation.''

Professor Fletcher's articles and answers to written questions ''articulate'' his view of the Constitution. Let's look at them. It is a view with which I disagree and which, in my judgment, will only exacerbate the problems of the Ninth Circuit.

Finally, I want to acknowledge that I realize we do not appear to have the votes to defeat this nomination. Nonetheless, I believe it is important to come to the floor and debate this nomination, rather than approve it in a midnight session.

Those of us on the Judiciary Committee have had the opportunity to reflect on the problems of the Ninth Circuit—the shortfall and the injustice for people who live in the Ninth Circuit, the likelihood that they get bad decisions and only three-tenths of 1 percent of them will ever be considered by the U.S. Supreme Court. This nominee would only make that problem worse. I urge my colleagues to oppose the nomination on that basis.

I yield the floor and reserve the remainder of the time for those opposing the nomination.

Mr. SPECTER addressed the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. SPECTER. Mr. President, I ask unanimous consent that I may speak for up to 5 minutes on the serious question of steel imports and introduce a piece of legislation.

Mr. LEAHY. Mr. President, does the Senator ask for that time outside the time of the Fletcher matter?

Mr. SPECTER. Mr. President, I do.

The PRESIDING OFFICER (Mr. ASHCROFT). Without objection, it is so ordered. The Senator from Pennsylvania is recognized.

Mr. SPECTER. I thank the Chair.

(The remarks of Mr. SPECTER pertaining to the introduction of S. 2580 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

The PRESIDING OFFICER. The Senate will now resume debate of the nomination of Judge Fletcher.

Mr. LEAHY. Mr. President, I ask the Chair, how much time is available to this side, the proponents of the Fletcher nomination?

The PRESIDING OFFICER (Mr. SMITH of Oregon). Twenty-three minutes 16 seconds.

Mr. LEAHY. I yield myself such time as I may need.

We heard discussion about the Ninth Circuit. There was a suggestion that it is reversed all the time.

In the year ending March 31, 1997, they decided 8,701 matters; the year ending March 31, 1996, 7,813 matters; in 1995, 7,955 matters. Well, 99.7 percent of those matters were not overturned.

I ask unanimous consent that an article by Judge Jerome Farris of the U.S. Court of Appeals for the Ninth Circuit be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE NINTH CIRCUIT—MOST MALIGNED CIRCUIT IN THE COUNTRY—FACT OR FICTION?

(By Hon. Jerome Farris*)

*Footnotes at end of article.

The Honorable Jerome Farris argues that the reason the Supreme Court overturns such a high percentage of Ninth Circuit cases accepted for review is not because the Circuit is ''too liberal.'' Rather, Judge Farris emphasizes the high volume of cases heard by the Ninth Circuit and its willingness to take on controversial issues. He suggests that any objective observer would conclude that the Ninth Circuit is functioning well and that the system is working precisely as the Framers of the United States Constitution intended.

The shell game has survived over the centuries because there are always those who are not merely willing, but delighted, to be deceived. If the game is played often enough and mindlessly enough, one can come very close to fooling ''all of the people all of the time.''

The Ninth Circuit—most maligned circuit in the country—fact or fiction? It is absolutely true that the United States Supreme Court accepted twenty-nine cases from the Ninth Circuit for review in 1997 and reversed twenty-eight of those decisions, affirming only one. The prior year, the Supreme Court reviewed twelve Ninth Circuit cases and reversed ten. In 1995, the Supreme Court reviewed fourteen Ninth Circuit decisions and reversed ten. During that period, no other circuit had so many decisions reversed or so high a percentage of reversals of cases accepted for review.[1]

According to these statistics, the Supreme Court reversed ninety-six percent of the Ninth Circuit cases it reviewed in 1997, an all time high.[2]

In the year ending March 31, 1997, the Ninth Circuit decided 8701 matters. In the same period ending in 1996, the Ninth Circuit decided 7813 matters. In 1995, the Ninth Circuit decided 7955 matters. If one considers the number of Ninth Circuit decisions reversed by the Supreme Court against the total number of cases decided by the Ninth Circuit, an entirely different picture emerges. Under this analysis, the Supreme Court let stand as final 99.7 percent of the Ninth Circuit's 1996 cases. No circuit in history has decided so many cases, and no circuit in history has had so low a percentage of cases reversed.

The point is not that one statistic is right and that the other statistic is wrong, but that statistics can be deceiving and can be used to paint almost any picture one wants. Courts issue ''opinions''; they do not decide right and wrong in an absolute sense. Courts cannot determine right and wrong in an absolute sense because the law is not absolute. Deciding a legal rule is not like figuring out an immutable law of physics—a court always strives for ''the right answer,'' but because the law has a life of its own, time determines what is correct. Courts on occasion reverse themselves for just that reason.

Any Ninth Circuit judge worthy of the title would want to revisit the decisions that were taken for review to determine whether in any single instance Supreme Court precedent was ignored. One cannot expect newspaper reporters to make that kind of review. News articles report the facts and others analyze the facts. It is my view that no responsible ''expert'' would comment before making such a review. What the review would reveal is no mystery because all decisions are in the domain of the public.

In 1997, the Supreme Court unanimously reversed twenty-one cases (eight of those decisions were per curiam). In the one Ninth Circuit case that the Supreme Court affirmed (the vote was eight to one), the majority held that the opinion properly followed Supreme Court precedent.[3] In one case that the Supreme Court unanimously reversed, the Ninth Circuit followed a Tenth Circuit decision. The Eighth Circuit, however, decided the issue a different way and the Supreme Court resolved the split.[4]

In *Saratoga Fishing Co.* v. *J.M. Martinac & Co.*,[5] a six to three reversal, Justice Scalia, joined by Justice Thomas, noted in dissent that ''an impressive line of lower court decisions applying both federal and state law''[6] has, like the Ninth Circuit, precluded liability in analogous situations.[7]

In eight of the reversed Ninth Circuit cases, the Supreme Court resolved conflicts between the circuits: *Old Chief v. United States*;[8] *California Division of Labor Standards Enforcement v. Dillingham Construction*;[9] *United States v. Brockamp*;[10] *Regents of the University of California v. Doe*;[11] *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, & Santa Fe Railway*;[12] *United States v. Hyde*;[13] *Glickman v. Wileman Bros. & Elliott*;[14] *Quality King Distributors, Inc. v. L'anza Research International, Inc.*[15] Thus, in many of the cases that were reversed, the Ninth Circuit was not alone in concluding a different result than the result the Supreme Court reached. Make no mistake, however, the Supreme Court *did* critcize the Ninth Circuit in some of its reversals. In one reversal, the Supreme Court stated that the Ninth Circuit failed to follow Supreme Court precedent.[16]

Courts are bound to follow Supreme Court precedent. However, what we write are opinions. The sin is not being wrong, but being wrong when the guidance was clear and when there was a deliberate failure to follow the guidance.

Two cases illustrate the dilemma of circuit courts: *Washington v. Glucksberg*,[17] regarding physician-assisted suicide, and *Printz v. United States*,[18] regarding the Brady Handgun Violence Prevention Act.[19] The Supreme Court reversed both of these Ninth Circuit decisions.

The Brady Act was widely discussed publicly and received much political interest. At issue in *Printz v. United States* was whether the Brady Handgun Act violated Article I, §8 and the Tenth Amendment of the United States Constitution by commanding chief law enforcement officers to conduct background checks of handgun purchasers. In a two to one decision, the Ninth Circuit found no constitutional violation. The Supreme Court, by a vote of five to four, reversed. Justice Scalia delivered the opinion of the Court in which Rehnquist, O'Connor, Kennedy, and Thomas joined; O'Connor filed a concurring opinion; Thomas filed a concurring opinion; Stevens filed a dissenting opinion, in which Souter, Ginsburg, and Breyer joined; Souter filed a separate dissenting opinion; and Breyer filed a dissenting opinion, in which Stevens joined. One might reasonably conclude that the solution was less than obvious.

Physician-assisted suicide has also been soundly debated in both public and political arenas. The question for decision in *Glucksberg* was whether a Washington statue that imposes a criminal penalty on anyone who ''aids another person to attempt suicide'' denies the Fourteenth Amendment's Due Process Clause liberty interest of mentally competent, terminally ill adults to choose their time and manner of death. The Ninth Circuit, in an eight to three en banc panel decision, found a liberty interest in the right to die and then weighed the individual's compelling liberty interest against the state's interest. The Ninth Circuit found the statute unconstitutional. The Supreme Court unanimously reversed the Ninth Circuit decision with five separate concurring opinions.

Was the Ninth Circuit ''wrong'' in either of these cases? The Circuit would have been, in my opinion, if it had not resolved each of the complex issues and given them full, careful, and decisive consideration. The Supreme Court reversed these decisions, but who would say that the system is not functioning as it was intended to function? Everyone is entitled to their own views, but the conclusion, in my view, is that the system envisioned by the Framers of the Constitution continues to function properly.

The decisions of the Supreme Court become the law of the land because our system of government requires settled law. It is therefore necessary that one court make a final decision, and, right or wrong, that decision governs our society.

That the Supreme Court can be ''wrong'' is evident to any student of American law, history, politics, or society. This county's jurisprudential history is filled with famous cases, affecting our entire society, in which the Supreme Court decided that it had previously reached an erroneous result: *Brown v. Board of Education of Topeka*;[20] *Bunting v. Oregon*;[21] *Garcia v. San Antonio Metropolitan Transit Authority*;[22] and twice reversing itself on death penalty cases in the 1970s, to name a few.

The Supreme Court also reverses itself in many less well-known cases. This term it reversed a decision regarding public school teachers in parochial schools.[23] The term before that it reversed itself in *Seminole Tribe of Florida v. Florida*,[24] and the year before that in *Hubbard v. United States*.[25] Justice Brandeis's dissent in the 1932 case, *Burnet v. Coronado Oil & Gas Co.*,[26] argued that the Supreme Court should overrule an earlier decision[27] and cites thirty-five cases in which the Supreme Court overruled or qualified its earlier decisions.

This list of Supreme Court reversals—in no way meant to be comprehensive—actually constitutes a high reversal rate considering that the Supreme Court currently averages about eighty to ninety decisions a year, or one percent of the number of cases that the Ninth Circuit hears. This comparison suggests that the Supreme Court would have to reverse one hundred Ninth Circuit cases a year in order to reverse the Ninth Circuit at as high a rate as the Supreme Court reverses itself (which it does about once a year).

In other instances, Congress has decided that the Supreme Court had the wrong answer and enacted legislation to effectively overrule the decision, such as the Religious Freedom Restoration Act of 1993 (RFRA)[28] and the 1982 Voting Rights Act Amendments.[29] The Supreme Court upheld the constitutionality of the 1982 Voting Rights Act Amendments[30] and it found RFRA unconstitutional.[31]

Do these results prove that Congress was right and that the Supreme Court was wrong? Or do these results prove that the Supreme Court was right and that Congress was wrong? Of course not. Rather, the results provide examples of the checks and balances designed in the Constitution to make our government run properly. Similarly, when the Supreme Court reverses an appellate court decision, it does not mean that the decision was wrong in an absolute sense, and more importantly, it does not mean that the appellate court was not functioning properly in its role in the judiciary and in the United States government.

Part of the cause of the misperception about right and wrong is created in the training of lawyers at law school. Most law schools begin teaching law in a formalistic manner: the student learns the law, and there is only one correct law. This formalism gets carried on as law students enter the legal profession. Lawyers often argue before

me that there is only one possible result (''The law dictates this result!''). This is rarely true, and is never true in complicated cases. There are always some arguments for each side, otherwise the case would be frivolous. The bottom line is that reasonable minds can differ and can each still be reasonable.

The Ninth Circuit deals with more cases than any other circuit. It is not surprising, then, that the Ninth Circuit would deal with more complicated and important issues than any other circuit. Both of these factors contribute to the Supreme Court's review and reversal of more Ninth Circuit cases than cases from other circuits.

Some observers contend that the Ninth Circuit is reversed so often because it is the most liberal circuit in the country and because the Supreme Court is currently conservative. This hypothesis also provides ammunition to those now arguing that the Ninth Circuit should be split (a topic for another article).[32] However, these observers have failed to review the facts. Of the opinions signed by Ninth Circuit judges that were reversed this year by the Supreme Court, eleven were authored by Democratic presidential appointees, and nine were authored by Republican presidential appointees. Apparently the Supreme Court is an equal opportunity reverser.

To function properly, each court must do its duty to the best of its ability. Parties must be able to rely on the full resolution of cutting edge issues in each court to which the issues are submitted. There is always the risk of reversal, but that risk should not—cannot—drive the system. The Supreme Court was better able to treat the question of physician-assisted suicide and the issue of the Brady Act because it had decisive opinions to review. One could assume that these issues are closed, and they certainly may be for the immediate future. History reminds us, though, that serious controversial issues are revisited from time to time. This comment is written by a circuit judge whose life would certainly have been different had the *Dred Scott*[33] decision not been revisited.

I make no prediction for the future of any of the Ninth Circuit reversals, but one commentator was not so cautious. Writing while *Glucksberg*[34] was pending before the Supreme Court, Roger S. Magnusson[35] in the *Pacific Rim Law and Policy Journal*, predicted:

Although an adverse Supreme Court opinion could potentially retard the process of pro-euthanasia law reform, this would be a temporary delay only which could not survive generational change. In the United States and beyond, the development of a legal right to die with medical assistance, appears inevitable.[36]

What is important to remember is that opinions, unlike arithmetic solutions, may vary. Our system under the Constitution is designed to put an end to variations because the Supreme Court makes the final decision. The danger is not that an appellate court gets reversed, but that a court might let possible reversal deter decisive, full, and reasoned consideration of important issues. An even greater danger is that the high regard in which all courts must be held if our system is to be a rule of law, not of judges, is threatened if those who are personally ambitious can dismiss a reasoned decision of any court with the throwaway phrase—''Oh well, that decision is just the irresponsible act of a coterie of liberal judges.'' All tyrants first seek to malign the rule of law.

FOOTNOTES

*Judge, United States Court of Appeals for the Ninth Circuit.

[1] The Supreme Court decided a total of ninety-one cases in the 1996 term, reversing sixty-five, affirming twenty-three, and otherwise disposing of three. *See* Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 1996*, 66 U.S.L.W. 3068 (U.S. July 15, 1997).

[2] All other circuits outside of the Ninth Circuit suffered a combined reversal rate of sixty-one percent. *See* Bill Kusliak, *Reversal Rate Keeps Getting Uglier*, San Francisco Recorder, July 2, 1997, at 1.

[3] *See* Babbitt v. Youpee, 117 S. Ct. 727, 732 (1997). In *Babbitt*, the Supreme Court affirmed the Ninth Circuit's holding that a provision of the Indian Land Consolidation Act worked an unconstitutional taking by requiring escheat to the tribe of certain fractional interests in allotment upon the owner's death. *See id.*

[4] *See* California Div. of Labor Standards Enforcement v. Dillingham Constr., 117 S. Ct. 832 (1997). The Ninth Circuit held that a California prevailing wage law governing wages of apprentices was preempted by ERISA. *See* Dillingham Constr. v. County of Sonoma, 57 F.3d 712, 722 (9th Cir. 1995). In reversing, the Supreme Court found that the law at issue neither referred to nor was connected with ERISA. *See Dillingham Constr.*, 117 S. Ct. at 834. Thus, the Court held that the law did not ''relate to'' an ERISA plan for purposes of preemption. *See id.*

[5] 117 S. Ct. 1783 (1997).

[6] *Saratoga Fishing*, 117 S. Ct. at 1791.

[7] The Ninth Circuit decision employed the *East River* doctrine, *see* East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 870 (1986), to preclude liability for property damage sustained on a vessel. *See* Saratoga Fishing Co. v. Marco Seattle, Inc., 69 F.3d 1432, 1446 (9th Cir. 1995). The Ninth Circuit found that equipment added to a vessel after purchase was part of the ''product itself.'' *See id.* In reversing, the Supreme Court concluded that the after-acquired equipment constituted ''other property,'' and was not a part of the ''product itself.'' *See Saratoga Fishing*, 117 S. Ct. at 1784.

[8] 117 S. Ct. 644 (1997). In *United States* v. *Old Chief*, the Ninth Circuit found that, despite a defendant's offer to stipulate, the government was entitled to present evidence of a prior felony to prove the current charge of felon in possession of a firearm. *See* No. 94–30277, 1995 WL 325745 (9th Cir. Apr. 14, 1995) (basing the decision on 18 U.S.C. §922(g)(1)). The Supreme Court disagreed, finding that the rejection of a defendant's offer to stipulate to a felony conviction constituted an abuse of discretion where the name or nature of the underlying conviction raised the risk of tainting the jury's verdict. *See Old Chief*, 117 S. Ct. at 645.

[9] 117 S. Ct. 832 (1997). *See supra* note 4 and accompanying text.

[10] 117 S. Ct. 849 (1997). In *Brockamp*, the Supreme Court reversed the Ninth Circuit holding which allowed equitable tolling of the statutory limitations period for tax refund claims. The Supreme Court concluded that the strong language of the statute precluded the Ninth Circuit's application of the presumption favoring equitable tolling. *See id.* at 851.

[11] 117 S. Ct. 900 (1997). In *Doe v. Lawrence Livermore National Laboratory*, 65 F.3d 771, 776 (9th Cir. 1995), the Ninth Circuit held that the University of California's right to indemnification from the federal government divested the university of Eleventh Amendment immunity. The Supreme Court reversed, holding that a state entity's potential legal liability, rather than financial responsibility for judgments, triggered the application of the Eleventh Amendment. *See Regents of the Univ. of Cal.*, 117 S. Ct. at 904.

[12] 117 S. Ct. 1513 (1997). In this action, the Supreme Court held that an ERISA provision prohibiting interference with protected rights applied to welfare plans. *See id.* at 1515. The Ninth Circuit found that the provision applied only to interference with the attainment of rights capable of vesting. *See* Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, & Santa Fe Ry. Co., 80 F 3d 348, 351 (9th Cir. 1996).

[13] 117 S. Ct. 1630 (1997). In *Hyde*, a criminal defendant attempted to withdraw his guilty plea after the plea was accepted, but prior to acceptance of the plea agreement. The Ninth Circuit reversed the district court's refusal to allow withdrawal without a showing by defendant of a ''fair and just reason.'' *See* Hyde v. United States, 92 F.3d 779, 781 (9th Cir. 1996). The Supreme Court held that a showing of ''fair and just reason'' by defendant was necessary. *See Hyde*, 117 S. Ct. at 1631.

[14] 117 S. Ct. 2130 (1997). In *Clickman*, the Court reversed the Ninth Circuit determination that mandatory assessments on growers, handlers, and processors of California tree fruits to pay for generic advertising violated the First Amendment. *See id.* at 2142. The Supreme Court rejected the use of a heightened First Amendment scrutiny and the Ninth Circuit's finding that the law compelled financial support of others' speech, SEE ID. at 2138-39.

[15] 117 S. Ct. 2406 (1997) (mem.).

[16] *See* Suitum v. Tahoe Reg'l Planning Agency, 117 S. Ct. 1659, 1665 (1997).

[17] 117 S. Ct. 2258 (1997).

[18] 117 S. Ct. 2365 (1997).

[19] 18 U.S.C. §922 (1994).

[20] 347 U.S. 483 (19954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)).

[21] 243 U.S. 426 (1917) (overruling Lochner v. New York, 198 U.S. 45 (1995)).

[22] 469 U.S. (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)).

[23] *See* Agostini v. Felton, 117 S. Ct. 1997 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985), and School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (overruled as to the portion addressing the ''Shared Time'' Program).

[24] 4116 S. Ct. 114 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).

[25] 514 U.S. 695 (1995) (overruling United States v. Branblett, 348 U.S. 503 (1995)).

[26] 285 U.S.C. 393 (1932), *overruled by* Helving v. Mountain Producers Corp., 303 U.S. 376 (1938).

[27] *See* Gillespie v. Okla, 257 U.S. 501 (1922) *overruled by Helvering, 303 U.S. at 376.*

[28] 42 U.S.C. §2000bb (1994).

[29] 42 U.S.C. §1973b (1994).

[30] *See* Reno v. Bossier Parish School Bd. 117 S. Ct. 1491 (1997).

[31] *See* Boerne v. Flores, 117 S. Ct. (1997).

[32] This argument, like most of the arguments for splitting the circuit, has never made sense to me. Accepting *arguendo*, the hypothesis that the Ninth Circuit is reversed often because it is to ''too'' liberal or ''too'' often wrong, a split will still leave at least one, and perhaps two, circuits that are too liberal or too often wrong.

[33] Dred Scott v. Sandford, 60 U.S. 393 (1856) (superseded by the adoption of the 13th and 14th Amendments of the U.S. Constitution after the Civil War).

[34] 117 S. Ct. 2258 (1997).

[35] Lecturer, University of Sydney School of Law; B.A. LL. B. (Hons) (A.N.U.) (1988), Ph.D. (Melb), (1994).

[36] Roger S. Magnusson, *The Sanctity of Life and the Right to Die: Social and Jurisprudential Aspects of the Euthanasia Debate in Australia and the United States*, 6 Pac. RIM & POL'Y J. 1, 5 (1997).

Mr. LEAHY. Mr. President, it has been suggested that if a court is overturned by the Supreme Court, that people ought to start asking whether those judges should be thrown out. And one Senator said, ''Suppose we were overturned like that, how long would we last here in the Senate?'' Well, it seems to me that the U.S. Senate voted very strongly—84 Senators voted for the so-called Communications Decency Act even though it was obviously unconstitutional. That went to the Supreme Court and was overturned.

A majority of the U.S. Senators voted for the line-item veto—again, blatantly unconstitutional but popular back home. That was overturned by the U.S. Supreme Court.

Eighty-five percent of the people, according to a poll, said they wanted some form of the Brady bill. This Senate voted for that overwhelmingly, knowing that it was probably unconstitutional. That was overturned by the Supreme Court.

I can think, since I have been here, of a number of times when this body went pell-mell forward on a number of bills because it was so popular to vote for them. Many times I found myself as a lone dissenter on matters that went to the U.S. Supreme Court and were then overturned as unconstitutional.

The same Senators who criticize judges who from time to time have an opinion reversed by a higher court ought to be careful with respect to what they advocate. If that standard were applied to Senators should all Senators who voted for a bill that gets

overturned as unconstitutional have to resign? Maybe not the first time they vote for something declared unconstitutional; maybe they shouldn't have to leave the first time, because everybody is allowed a mistake. If they did it a second time, do they have to go then? I come from a tolerant State. I belong to a religion that believes in redemption and forgiveness. So we will let them get away with two.

We are in the baseball season. Suppose they voted for three unconstitutional bills because they were popular but they get overturned as unconstitutional. Well, we are now considering perspectives beyond religion and politics, we are going to baseball. Three times, three strikes—are you out? Let's be a little careful when we use some of these analogies about who should or should not serve on a court depending on how many times they get reversed.

Senators may not want to go back and ask how many times they voted for something, how many times they gave wonderful speeches in favor of something, how many times they sent out press releases, sent feeds back to their TV station, maybe used them in their reelection ads, and then, guess what? The U.S. Supreme Court overturned that legislation as unconstitutional.

Especially, I say to some of my friends on the other side, when the majority of those voting to declare those laws unconstitutional were Republican members of the U.S. Supreme Court, reported by Republican Presidents, and extolled as great conservatives. In each one of the cases I have referenced, I agreed with them. They were the true conservatives. What they wanted to conserve was the Constitution of the United States.

Sometimes when we want to stand up here and tell how conservative we are, we ought to say: Are we conservative with regard to the Constitution of the United States? Are we prepared to conserve the U.S. Constitution?

I recall one day on a court-stripping bill on this floor years ago an effort was made to pass a court-stripping bill, a bill to withdraw jurisdiction from the courts over certain matters of constitutional remedies, because the polls showed how popular it would be. One Friday afternoon, three Senators stood on this floor and talked that bill into the ground.

I was proud to be one of those three Senators. As I walked out with the other two—one, the Senator from Connecticut, then an independent, Senator Lowell Weicker; the third Senator who had joined with us to talk down that court-stripping bill, my good friend, now deceased, Senator Barry Goldwater of Arizona. Senator Goldwater put his arms around the shoulders of both of us, and we were both a little bit taller than he, and said, ''I think we are the only three conservatives in the place.''

I can't speak for Senator Weicker, how he might have felt about that; I took it as a heck of a compliment—not because I go back and claim to be a conservative in my politics back home. I only claim to be a Vermonter, doing the best I can for my State. When I stand up for the U.S. Constitution, as I have so many times for the first amendment, I do it because I try to conserve what is best in our country.

Professor William Fletcher is a fine nominee. He is a decent man. He was first nominated to the U.S. Court of Appeals for the Ninth Circuit, May 7, 1995, over 3 years ago. I don't know of any judicial nominee who has had to endure the delay and show the patience of this nominee. He was nominated May 7, 1995. We are only a few months away from 1999.

I have spoken on many occasions about how the Republican Senate is rewriting the record books in terms of delaying action on judicial nominees, but Professor Fletcher's 41 months exceeds the 33-month delay in the consideration of the nomination of Judge Richard Paez and Anabelle Rodriguez; or the 26 months it took to confirm Ann Aiken; or the 24 months it took to confirm Margaret McKeown; or the 21-month delay before confirmation of Margaret Morrow and Hilda Tagle who found, unfortunately, in this Senate, that if you are either a woman or a minority, you seem to take a lot longer to get through the Senate confirmation process.

In the annual report on the judiciary, the Chief Justice of the Supreme Court observed:

> Some current nominees have been waiting a considerable time for a Senate Judiciary Committee vote or a final floor vote. The Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed in 1994.

He went on to note:

> The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.

Mr. President, 3½ years is a long time to examine a nomination and to leave a judgeship vacant. Even at the pace of the U.S. Senate, 3½ years is long enough for us to make up our mind.

Around Mother's Day in 1996, the Judiciary Committee did report the nomination of Professor Fletcher to the Senate, but that year the majority, Republican majority, decided not to vote on any nominees to courts of appeals, so the nomination was not considered by the Senate. The committee vote, though, in 1996 was more than 2–1 in favor, including Senator HATCH, Senator SPECTER, Senator DEWINE, and Senator SIMPSON. This year, the vote was delayed until past Mother's Day. The vote was taken May 21, 1998. The committee's second consideration of the nominee resulted in a vote of 2–1.

I know some do not like Judge Betty Binn Fletcher. They do not agree with her decisions. In our Federal judicial system, there are mechanisms for holding judges accountable. There are panels of judges at the courts of appeals. There are en banc considerations. There is ultimately the controlling authority of the U.S. Supreme Court. Judge Fletcher's decisions are subject to review and reversal, just like every other judge.

No one should turn their anger with Judge Betty Fletcher into a reason to delay or oppose the appointment of Professor William A. Fletcher. No one should try to get back at Judge Betty B. Fletcher through delay of the confirmation of her son.

Senate Republicans have continued their attacks against an independent Federal judiciary and delayed in filling longstanding vacancies with qualified persons being nominated by the President. Professor Fletcher's nomination has been a casualty of their efforts. Forty-one months—41 months—and two confirmation hearings have been enough time for examination to bring the Fletcher nomination to a vote. Professor Fletcher is a fine person and an outstanding nominee who has had to endure years of delay and demagoguery as some chose to play politics with our independent judiciary.

Professor Fletcher has the support of both Senators from California. The ABA gave him the highest rating. He is supported by many judges and lawyers and scholars from around the State, the Ninth Circuit, and the country. I commend the distinguished chairman of the Senate Judiciary Committee, the senior Senator from Utah, Senator HATCH, and many other Republican Senators who have continued to support this fair-minded nominee.

I look forward to Senate action this afternoon and I look forward to the fact that he will be confirmed.

Mr. President, I withhold the remainder of my time.

I yield the floor.

Mr. THURMOND. Mr. President, I rise today in opposition to the nomination of William Fletcher for the Ninth Circuit Court of Appeals.

When this nomination was first considered in the Judiciary Committee in 1996, I opposed it because I believed that the anti-nepotism statute, 28 U.S.C. 458, prohibited him from serving on the Ninth Circuit based on the fact that his mother, Betty Fletcher, is a judge on the same court. There has been some dispute about whether this statute applies to judges rather than only inferior court employees, and the Senate yesterday passed legislation by Senator Kyl to clarify that the statute does apply to judges. However, the revision is prospective in nature and does not apply to Professor Fletcher. In my view, Professor Fletcher's nomination violates the statute as it existed before the Senate's clarification. Thus, I must oppose this nomination because I believe it violates the anti-nepotism laws.

Moreover, I have serious reservations about Professor Fletcher's judicial philosophy. I believe we have a duty to oppose nominees who do not have a proper respect for the limited role of a judge in our system of government.

One of the strongest and most influential advocates for an activist Federal judiciary in this century was Supreme Court Justice William Brennan. He believed that the Constitution was a living document and that judges should interpret the Constitution as though its words change and adapt over time. I have always believed that this view of the Constitution is not only wrong but dangerous to our system of government. The words of the Constitution do not change. They have an established meaning that should not change based on the views of a judge. They should change only through an amendment to the Constitution. It is through the amendment process that the people can determine for themselves what the Constitution says, rather than unaccountable, unelected judges making the decisions for them.

Professor Fletcher has written in strong support of Justice Brennan and his activist judicial philosophy. In a 1991 law review article, he praised Justice Brennan for his, quote, ''sense that the Constitution has meaning beyond the bare words of the text.'' He stated that some parts of the Constitution are, quote, ''almost constitutional truths in search of a text.'' He even approvingly quoted Justice Brennan's famous statement regarding Constitutional interpretation that, quote, ''the ultimate question must be what do the words of the text mean in our time.''

I firmly believe that the role of the judge is to interpret the law as the legislature intended, not to interpret the law consistent with the judge's public policy objectives. A judge does not make the law and is not a public policy maker. Professor Fletcher has been critical of the modern Supreme Court for its lack of political and governmental experience. In a 1987 law review article, he criticized recent landmark Supreme Court decisions on the separation of powers, saying the Court, quote, ''read the Constitution in a literalistic way to upset what the other two branches had decided, under the political circumstances, was the most workable arrangement.'' What is convenient in a political sense is irrelevant to a proper interpretation of the Constitution.

Moreover, Professor Fletcher has been nominated to the Ninth Circuit, and the Supreme Court routinely finds it necessary to reverse the Ninth Circuit. Indeed, in recent years, the Ninth Circuit has been reversed far more often than any other circuit. This trend will be corrected only if we confirm sound, mainstream judges to this critical circuit. I do not see that problem abating with nominees such as the one here, who even characterizes himself as being in his words, quote, ''fairly close to the mainstream.''

If Professor Fletcher is confirmed, I sincerely hope that he turns out to be a sound, mainstream judge and not a judicial activist from the left. I hope he helps to improve the dismal reversal rate of the Ninth Circuit.

However, we must evaluate judges based on the record we have before us. As I read Professor Fletcher's record, it does not convince me that he is an appropriate addition to the Court of Appeals. Therefore, because of my interpretation of the anti-nepotism statute and my concerns about judicial activism, I cannot support this nominee.

Mr. BAUCUS. Mr. President, I rise today to express my strong support for the nomination of William A. Fletcher to the U.S. Court of Appeals for the Ninth Circuit. Mr. Fletcher has proven himself superbly qualified for this position. A man of deep personal integrity, of sound judgement and a well respected legal scholar, Mr. Fletcher's nomination is certainly deserved and given that five judgeships remain vacant on the Ninth Circuit, his confirmation is well past due.

Mr. Fletcher's qualifications for this position are truly remarkable, Mr. President. He is a graduate of Harvard University and a Rhodes Scholar. William Fletcher earned his law degree from Yale, clerked at the United States Supreme Court, and has dedicated himself to a career of exploring legal theories as a professor and as an esteemed author.

Fletcher has been a professor at Boalt Hall since 1977 where he was awarded the Distinguished Teaching Award in 1993, an honor bestowed annually upon the five finest faculty members on the Berkley campus. Fletcher has also served as a visiting professor at the University of Michigan, Stanford Law School, Hastings College of Law, and the University of Cologne, and he has served as an instructor at the Salzburg Seminars.

Professor Fletcher's scholarly works include influential law review articles that have been immensely useful to both academics and practitioners. His works include published articles relating to the topics of civil procedure and federal courts, such as standing and the Eleventh Amendment, sovereign immunity and federal common law. In exploring the law and authoring these esteemed articles, Fletcher demonstrates his uncanny powers of analysis and steadfast objectivity.

In addition to my support Mr. President, William Fletcher's nomination enjoys broad support across political and ideological spectrums. He has been endorsed not only by an extensive array of his peers throughout the country, but also by a number of non-partisan observers and the American Bar Association, all of whom comment on the centrist, pragmatic approach he brings to the law. I am completely confident that Mr. Fletcher is the best possible candidate to the U.S. Court of Appeals for the Ninth Circuit.

So again Mr. President I would like to express my unequivocal support for William A. Fletcher as a highly qualified nominee to the U.S. Court of Appeals for the Ninth Circuit. I will conclude by quoting one of Mr. Fletcher's colleagues in saying ''If Willy Fletcher presents a problem [for the Judiciary Committee], there is no academic in America who should get a court appointment.''

Mr. SESSIONS. Mr. President, how much time remains?

The PRESIDING OFFICER. The Senator from Alabama has 6 minutes 40 seconds.

Mr. SESSIONS. Mr. President, there have been several speakers, including the Senator from Ohio and the Senator from Missouri, who have talked about the unique circumstances that are at foot here in dealing with the Ninth Circuit, and that we have a responsibility and a duty to make sure that we use our advise and consent authority wisely to improve the courts in America, and the Ninth Circuit is in need of, severe need of reform. It has been reversed in nearly 90 percent of its cases in the last 2 years—an unprecedented record that no circuit, to my knowledge, has even been suggested to have approached. The New York Times has referred to the Ninth Circuit Court of Appeals—which includes California and most of the west coast—and they said that a majority of the Supreme Court considers the Ninth Circuit a rogue circuit.

Now, some Senators suggest this is politics. Mr. President, I was elected by the people of my State to come here, and one of my duties is to evaluate Federal judges. I have affirmed and voted for the overwhelming majority of the Clinton nominees. I am willing to vote on this one. I have agreed to this nomination to come up and be voted on. But I want to have my say. I am concerned about this. I don't think that is politics.

As a matter of fact, let me quote to you from an article that Mr. Fletcher, the nominee, wrote a few years ago referring to the confirmation process involving Justice Clarence Thomas. What he said about the role of the Senate was this:

> Does the Senate have the political will—

That is us, me—

> to come down here and do the unpleasant duty of standing up and—

And talk about a gentleman who is charming, I am sure, and a nice fellow—

> talking about the unpleasant fact that he may not be the right nominee for the court?

He said:

> Does the Senate have the political will to insist that its constitutional advise and consent role become a working reality?

Mr. President, I have been here 2 years. One nominee withdrew before a vote, and we hadn't voted on any nominees. So we are not abusing our advise and consent power. As a matter of fact, I don't think we have been aggressive enough in utilizing it to ensure that the nominees to the Federal bench are mainstream nominees.

That is what we are talking about. He said, ''The Senate must be prepared to persuade. . . .'' This is Mr. Fletcher, who wrote this article. He is an academic, a professor, so he can sit around and find time to write these articles. We are not dealing with a proven practitioner, a person who served as a State or Federal judge, as we normally have. We are dealing with a nominee who has never practiced law in his life, has never tried a lawsuit, has never been in court and had to answer to a judge. Yet, he is going to be superintending the largest Federal circuit in the country. This is what he wrote:

The Senate must be prepared to persuade the public that an insistence on full participation in choosing judges is not a usurpation of power.

That is all we are doing. We are telling the President of the United States—and it is going to get more serious with additional nominees to this circuit—that we have to have some mainstream nominees. We have to do something about the Ninth Circuit, where 27 out of 28 cases were reversed in the term before last, and 13 out of 17 were reversed in the last term. That has been going on for 15 or 20 years. It is not even a secret problem anymore. It is an open, acknowledged problem in American jurisprudence. The U.S. Supreme Court is trying to maintain uniformity of the law.

For example, this summer, the Ninth Circuit was the only circuit to rule that the Prison Litigation Reform Act—passed here to improve some of the horrendous problems we were having with litigation by prisoners—was unconstitutional. Every other circuit that addressed the issue upheld the constitutionality of this act, including the First, Fourth, Sixth, Eighth, and Eleventh Circuit have affirmed the constitutionality of the Prison Litigation Reform Act. But not the Ninth Circuit. It is out there again.

As a matter of fact, I have learned that they utilize an extraordinary amount of funds of the taxpayers on defense of criminal cases. In fact, they have approved one-half of the fees for court-appointed counsel in the entire United States. There are 11 circuits in America. This one is the biggest, but certainly not more than 20, 25 percent of the country—probably less than that. They did half of the court-appointed attorney's fees because they are turning criminal cases into prolonged processes where there is no finality in the judgment—a problem that America is coming to grips with, the Supreme Court is coming to grips with, and the people of this country are coming to grips with. That is just an example of what it means to have a problem there.

Mr. President, I will just say this: This nominee was a law clerk, in addition to never having practiced, and he clerked for Justice Brennan, who was widely recognized as the epitome of judicial activism. His mother is on this court today, the Ninth Circuit, and she is recognized as the most liberal member of the court. Perhaps one other is more liberal. It is a problem we have to deal with.

I would like to mention this. In talking about the confirmation process, he made some unkind and unwise comments about Justice Thomas in a 1991 article. He questioned, I think fundamentally, the integrity of Justice Thomas. What kind of standard do we need to apply here? He believed a very high standard. This is what he said:

Judge Clarence Thomas did have a record, although not distinguished enough to merit President Bush's accolades. But Thomas backed away from that record, pretending he meant none of what he had written, and said that he never talked about Roe v. Wade with anyone and, of course, he didn't talk dirty to Anita Hill either.

The PRESIDING OFFICER. All of the Senator's time has expired.

Mr. SESSIONS. Mr. President, I think that was an unkind comment. I don't believe he is the right person for this circuit, and I object to his nomination.

I yield the floor.

Mr. LEAHY. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 11 minutes 4 seconds.

Mr. LEAHY. Mr. President, Mr. Fletcher has waited a long, long time—nearly 3½ years—for this moment. He has been voted out of the Senate Judiciary Committee by an overwhelming margin twice. He is strongly supported by both Republicans and Democrats in this body. He has waited long enough.

I yield back the remainder of my time so we can go to a vote on Professor Fletcher.

The PRESIDING OFFICER. The question is on agreeing to the nomination. Are the yeas and nays requested?

Mr. LEAHY. Mr. President, I think the other side has forgotten to ask for the yeas and nays.

To protect them, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of William A. Fletcher, of California, to be a United States Circuit Judge for the Ninth Circuit? On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. FORD. I announce that the Senator from Ohio (Mr. GLENN) and the Senator from South Carolina (Mr. HOLLINGS) are necessarily absent.

The result was announced—yeas 57, nays 41, as follows:

[Rollcall Vote No. 309 Ex.]

YEAS—57

Akaka	Bingaman	Bumpers
Baucus	Boxer	Byrd
Bennett	Breaux	Chafee
Biden	Bryan	Cleland
Collins	Inouye	Moseley-Braun
Conrad	Jeffords	Moynihan
D'Amato	Johnson	Murray
Daschle	Kennedy	Reed
Dodd	Kerrey	Reid
Domenici	Kerry	Robb
Dorgan	Kohl	Rockefeller
Durbin	Landrieu	Roth
Feingold	Lautenberg	Sarbanes
Feinstein	Leahy	Smith (OR)
Ford	Levin	Specter
Gorton	Lieberman	Stevens
Graham	Lugar	Torricelli
Harkin	Mack	Wellstone
Hatch	Mikulski	Wyden

NAYS—41

Abraham	Frist	McConnell
Allard	Gramm	Murkowski
Ashcroft	Grams	Nickles
Bond	Grassley	Roberts
Brownback	Gregg	Santorum
Burns	Hagel	Sessions
Campbell	Helms	Shelby
Coats	Hutchinson	Smith (NH)
Cochran	Hutchison	Snowe
Coverdell	Inhofe	Thomas
Craig	Kempthorne	Thompson
DeWine	Kyl	Thurmond
Enzi	Lott	Warner
Faircloth	McCain	

NOT VOTING—2

Glenn	Hollings

The nomination was confirmed.

Mr. WARNER addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from Virginia.

If the Senator will withhold for one moment.

EXECUTIVE CALENDAR

The PRESIDING OFFICER. Under the previous order, the Senate now confirms Executive Calendar Nos. 803, 804, 808, en bloc.

The nominations considered and confirmed en bloc are as follows:

THE JUDICIARY

H. Dean Buttram, Jr., of Alabama, to be United States District Judge for the Northern District of Alabama.

Inge Prytz Johnson, of Alabama, to be United States District Judge for the Northern District of Alabama.

Robert Bruce King, of West Virginia, to be United States Circuit Judge for the Fourth Circuit.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Mr. President, I would like to address the Senate.

The PRESIDING OFFICER. The Senator from Virginia cannot be heard. Please come to order.

The Senator from Virginia.

Mr. WARNER. Mr. President, I see our distinguished colleague from West Virginia has risen.

May I retain the floor?

Mr. BYRD. Absolutely. Parliamentary inquiry.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. BYRD. Mr. President, has the motion been made to reconsider the vote by which the nominees were confirmed?

The PRESIDING OFFICER. By the agreement, that has been laid on the table and the President is to be immediately notified of the Senate's action.

Mr. BYRD. Very well, has the Senate returned to legislative session?